Date: September 29, 1995

Case No.: 95-ERA-4

In the Matter of:

EARL VANDORN KEENE
Complainant
vs.

EBASCO CONSTRUCTORS, INC.,
a/k/a RAYTHEON CONSTRUCTORS,
k/n/a RAYTHEON ENGINEERS AND
CONSTRUCTORS, INC.
Respondent

RECOMMENDED DECISION AND ORDER

Background

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ("Act"), 42 U.S.C. §5851 (1992). Complainant Earl Vandorn Keene ("Keene" or "Complainant") filed a complaint with the Department of Labor on September 9, 1994, alleging that he was a protected employee who had engaged in protected activity within the scope of the Act and was a victim of retaliation as a result of that activity.

An investigation was conducted by the Houston, Texas Office of the Wage & Hour Division of the Department of Labor. In a letter dated October 25, 1994, the District Director determined that the Complainant had not been terminated by the Respondents EBASCO Constructors, Inc. ("EBASCO") [1] and Houston Lighting & Power Company ("HL&P") [2] in retaliation for engaging in protected activities. Specifically, the Director found that Complainant's termination was not in violation of the statutes.

On October 28, 1994, Complainant appealed the initial determination of the District Director. The matter was docketed in the Office of Administrative Law Judges and assigned to me on

November 9, 1994, and on November 14, 1994 an Order issued setting the case for trial on December 12, 1994. Thereafter, however, by
agreement of both counsel, the case was reset for June 5, 1995.

(ALJ 1). Both parties have waived the usual time restrictions in a case of this nature. (Tr. 11, 435).

A formal hearing was held in this matter on June 5-6, 1995, in Houston, Texas, at which time the parties were afforded full opportunity to present evidence and argument. The parties sought and were granted until September, 1995, to file post-hearing briefs. The findings and conclusions in this Decision are based upon observation of the witnesses who testified, upon an analysis of the entire record, arguments of the parties, applicable regulations, statutes and case law precedent. [3]

Exhibits and Stipulations

The exhibits in this case consist of one Administrative Exhibit (consisting of the complaint, the determination letter from the District Director, Mr. Keene's request for formal hearing, the first Notice of Hearing, an agreed continuance filed by Complainant, and the second Notice of Hearing); 31 Complainant's Exhibits; and 21 Respondent's Exhibits. At the outset of the hearing, the parties stipulated that (1) Respondent is subject to the Act, and (2) the Complainant was an employee protected under the Act. [4]

Issues

The following are the unresolved issues in this matter:

1. Whether the Complainant engaged in protected activity under the Act;

2. Whether the Respondent knew or had knowledge that the Complainant engaged in protected activity;

3. Whether the actions taken against Complainant were motivated at least in part, by Complainant's engagement in protected activity; and

4. What damages, if any, the Complainant is entitled to as a result of the retaliatory actions taken by Respondent.

Findings of Fact

1. Complainant is a journeyman electrician and is a member

[PAGE 3]
of local union 716, Houston, Texas. Complainant was employed by EBASCO (through the union) at the South Texas Nuclear Project ("STP") in Wadsworth, Texas, as an electrician on approximately eight occasions. (Tr. 64). On each such occasion, the Complainant accepted a referral from the union via a hiring hall relationship
maintained pursuant to a collective bargaining agreement to which EBASCO has been a party. (Tr. 60). The collective bargaining agreement permitted EBASCO to reject a referred worker for any

reason and without cause. (RX 5). Complainant had been included in layoffs on earlier occasions while employed with EBASCO at STP. (Tr. 64).

2. HL&P is the owner of STP. (Tr. 18). During the course of Complainant's employment, EBASCO contracted with HL&P to provide maintenance and construction modification work at STP. (Tr. 18-19). The facility is a nuclear power plant, and as such EBASCO must comply with Nuclear Regulatory Commission ("NRC") regulatory requirements for all safety related work done there.

3. In January 1994, Complainant was employed by EBASCO at STP doing electrical work, including running conduits, installing cables, and electrical remodification throughout the plant. (Tr. 65). On January 18, 1994, Complainant was laid off in a reduction in force. (Tr. 66-67). His termination notice indicated that he
was eligible for rehire, and rated him as "good" in all areas: skill, cooperation, attendance, physical fitness, personal habits and safety attitude. (CX 1). At the time of his layoff, Complainant had unescorted access to the protected and vital areas of STP.

4. On March 10, 1994, Complainant was recalled for work at STP. (Tr. 67). At the time Complainant was rehired, he underwent fitness for duty testing and a background security check required of all prospective employees by HL&P even though they might have worked on the project in the past. (Tr. 69 & 70). An employee is not permitted unescorted access to the plant until such time as that person has passed the fitness for duty testing and security check pursuant to HL&P policy. (Tr. 71).

5. While waiting for unescorted access, Complainant was required to work with an escort, i.e., an individual who did have unescorted access. On March 10, 1994, Keene was assigned to a crew. Don Sciba was the general foreman, John Douglas was the foreman, and Arthur Renfro was Complainant's co-worker and assigned as his escort. All were employees of EBASCO. Keene was assigned
to work as a journeyman electrician on the demineralization skid project [5] terminating cables. (Tr. 70). The demineralization operation, including the equipment, are permanent plant equipment.

[PAGE 4]
(Tr. 71). The operation demineralizes the water that is to be used in the plant facility for the reactor or for testing. (Tr. 70). The particular cable terminations involved were non-safety related.
(Tr. 60; CX 23, p. 197).

6. The General Foreman, Don Sciba, instructed the crew to proceed under "work direction" which according to him was a practice which permitted the certified electrician and non-certified electrician to work together, with the certified electrician signing off on the work package as performer. (Tr. 29, 35, 240). Under HL&P procedures, "work direction" meant that at

least one individual who was certified oversaw the performance of the work. It required that the performer sign as a performer. (Tr. 407 & 410). A verifier was required to check the work after it was complete and sign off as a verifier. (Tr. 264). A reviewer would then review the documentation to ensure that the proper signatures were in place. (Tr. 263). There had been some general confusion within the electrical craft in the past concerning the specifics of work direction and sign off procedures. (Tr. 410).

7. On March 17, 1994, Renfro and Keene were assigned to terminate cables on the demineralization skid project. Renfro told Keene that he would perform the work, and Keene, who was certified, would sign off as performer, i.e., as if he had actually done the work. Keene told Renfro he did not want to do that and did not believe the procedures permitted it. (Tr. 82-83). When Renfroe began to perform the work after taking some prepatory actions, Keene again told Renfro that Renfro would have to sign as performer and Keene would sign as verifier. A disagreement ensued with Renfro stating that he had been instructed to perform the work, have the certified verifier sign as performer, and a third person, who was not actually present while the work was being performed, sign as verifier. (Tr. 31, 35-36). Renfro's explanation for this procedure was that the entire crew had been instructed by Douglas and Sciba that non-certified electricians could not sign the work packages at all, as either performers or verifiers, although it was acceptable for them to actually perform the work. (Tr. 35). Renfro told Keene that the entire project had been done that way. (Tr. 85, 29-30, 42). Keene asked Renfro if he had "something in writing that says that we can do this." (Tr. 157). Renfro answered that he did not. Keene then told Renfroe that the procedure he had been using was wrong; that he was not going to do it that way; that that would constitute falsification of documents; and for Renfro to move out of the way if he would not take Keene's work direction. (Tr. 82-83). Keene then told Renfro to "get out of the control cabinet," and he performed the cable termination and signed as performer. (Tr. 82-83, 157). They were not finished with the

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remaining cable terminations in the cabinet, but both decided to seek further direction from their superiors.

8. In order to resolve the dispute, Keene and Renfro went to the office of their foreman, John Douglas, to tell him of their dispute and to ask him for the procedure that would permit the performance of the work as described by Renfro. (Tr. 358). Keene explained to Douglas that the procedure outlined by Renfro would constitute a falsification of documents and that he would not follow such a procedure. (Tr. 85, 91). Keene was concerned that if the entire demineralization skid project had been done in this manner, as Renfro said it had (Tr. 29-30, 42, 85-86), then the entire project had been done incorrectly and not according to proper procedure. Keene believed that this process would be improper because it would be impossible to tell by reviewing the

documentation who had actually performed the cable terminations. (Tr. 85-86). After listening to the dispute, Douglas rejected Keene's concern, and signed the work package at issue as verifier. He did not leave the office to actually look at the termination
Keene had performed. Lonnie Kugler, whose initials appear on the sheet that was produced to Complainant, did not witness the performance of the work either. (Tr. 36).

9. While meeting with Douglas to discuss the falsification of documents, Keene also brought up a quality control concern regarding the taping of cables. Keene had previously been instructed by Quality Control personnel, during construction of STP, that the cables were not to be taped, as that could hide a nick in the cable. (Tr. 83, 158; *see also* CX 2, p. K0869, which states "Do not use [tape] on stainless steel or nickel based alloys"). Subsequently, Douglas told Keene not to use the tape. (Tr. 87). However, Douglas went to Sciba with the concern, and later that day instructed the entire crew that taping cables
was preferable. (Tr. 87).

10. The same day Keene went to Douglas with his concerns, he was transferred to another job assignment, working on time run meters. (Tr. 37, 92). This transfer was despite the fact that the work Complainant and Renfro were performing at the demineralization skid project was not completed (Tr. 37-39, 91-92), and despite
the fact that Keene was certified to do that work and there was a shortage of certified electricians available. (Tr. 41).

11. That same day, riding home from work, Keene discussed the performer/verifier/falsification issue with his friend, J. D. Riley. Riley was a union steward, with another contract. (Tr. 312). Keene asked Riley to take his concerns to EBASCO management.

[PAGE 6]
(Tr. 93, 215). Keene indicated to Riley that he was fearful of retaliation if he raised the concerns directly himself. (Tr. 215).

12. The next day (March 18, 1994), Riley went to Bill Johnson, Electrical Modification Supervisor, and told him that there was a concern about falsification of documents, documents being signed off when they should not have been, performers singing off on work that they did not actually perform, and verifiers signing off on work that was never verified. Riley told Johnson that the project that was in question was the demineralization skid project. (Tr. 215-16). Although Johnson requested the name of the person raising the concern, Riley did not immediately provide Johnson with Keene's name. (Tr. 216). Instead, Riley informed Johnson that he did not know whether the person wanted his name revealed, but that he would check. (Tr. 216-17).

13. Riley later told Keene that Johnson wanted to know the

name of the person raising the concern about falsification of documents and the work package number that he had been working on when the falsification issue arose. (Tr. 217). Keene gave Riley permission to use his name. However, Keene did not know the work package number. (Tr. 94). In order to help Johnson identify the work, Keene told Riley that he had been transferred to the time run meters immediately after raising the concern, and that if the time run meter time logs were examined to see the point where he had been transferred, the work package number of the demineralization skid project that he had been working on could be traced. (Tr. 94).

14. Within a day, Riley disclosed Keene's name to Johnson. (Tr. 217). He did not give Johnson the work package number for the demineralization skid project, as he did not know the package number.

15. Apparently in confusion over which work package numbers Keene had raised his concern about, Johnson had an investigation of potential falsification of documents conducted regarding the time run meters, although Keene never raised a concern about the time run meters. (Tr. 92). No evidence of falsification of the time run meter packages was found.

16. Keene continued to work at STP until March 24, 1994. He was never re-assigned to the demineralization skid project. On March 24, 1994, the same day that he received unescorted access to STP, Keene was terminated. Seven electricians were laid off at that time and five had certifications. (CX 3, Tr. 411). Sciba "came up with the names of the people in [Douglas'] crew that were

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[PAGE 7]
getting laid off." (Tr. 238, 287). Sciba took full responsibility for determining which electricians were laid off during the RIF.
(CX 12, p. K1179). Renfro testified that there as a shortage of certified electricians, and Keene was certified. (Tr. 41, 245).

17. Four days later, on March 28, 1994, Casey Davis, EBASCO Access Screening Director, questioned Riley about his involvement in reporting concerns to Johnson. Davis discussed the duties and responsibilities of the union steward, and that contractual interacting was not acceptable. (CX 12). Riley represented Local Union 66; Keene was a member of Local Union 716.

18. Keene's termination notice rated him only "fair" for cooperation, attendance, personal habits and safety attitude, although he had been rated as "good" in all of these areas after his January lay-off. (CX 1 & 4). The March 24, 1994 lay off evaluation was performed by Sciba, and approved by Bill Johnson. Keene only worked for approximately two weeks during March 1994, with no evidence of improper conduct.

19. Apparently no EBASCO supervisor ever investigated the falsification of the demineralization skid project. (Tr. 166).

In fact, until Keene's interview by the Department of Labor, allegedly no one in management even understood that Keene had raised falsification of records regarding the demineralization skid project. (CX 12, p. K1179). However, there can be little doubt that Renfro, Douglas and Sciba knew. Renfro was "in the cabinet" when Keene insisted on seeing a procedure permitting Renfro's interpretation of the procedure. (Tr. 157). When Renfroe was interviewed on October 11, 1994, by Andrew Woods, HL&P Supervisor of Legal and Personnel Services, about the matter, Renfroe confirmed that he performed work that he did not sign for. (CX 12, p. K 1179). Douglas was the supervisor that pulled Keene off one project and assigned him to the next. (Tr. 91). Although Douglas told Woods that Keene did not approach him about the procedural requirements for who should sign as performer and verifier (Tr. 358), I do not accept Douglas' statement. From Complainant's disagreement with Renfro over the subject, it can be inferred that Keene approached Douglas about the subject when the three met. Subsequently, the same day Douglas met with Sciba. On April 1, 1994, Douglas quit because he had been accused of falsifying records, and at the hearing he conceded he knew the allegations came from the Complainant.

20. On April 5, 1994, approximately two weeks after he had been laid off, Complainant met with Congressional investigators from the Committee on Energy and Commerce, regarding his concerns

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about the falsification of documents at STP. (Tr. 209).

21. Between March 24 and June 2, 1994, Complainant worked union jobs in LaPorte and Austin, Texas. These jobs were not with EBASCO.

22. On May 16, 1994, Keene received a recall notice for EBASCO at STP through the union, for a job to begin on June 2, 1994. (Tr. 102-03). Douglas also received a recall notice. When he heard that Keene would be working there too, Douglas refused the call. (Tr. 103-04, 258-59).

23. Casey Davis testified that after Keene accepted the recall, EBASCO Supervisor for Maintenance Modifications, Gary Kaminski, and he had a discussion about Keene, and that "Kaminski was not excited about Mr. Keene returning to the project" because "Keene was not an active participant and he took a lot of supervision in order to get his work completed." (Tr. 296). Davis had never heard that before about Keene. (Tr. 297). Davis also had a conversation with Sciba about Keene returning to work. "Sciba said that [Keene] required supervision, similar to [the statement by] Mr. Kaminski." (Tr. 299).

24. On May 24, 1994, prior to returning to work for EBASCO, Complainant accompanied a friend, John Crawford, to the EBASCO Access Screening office at the STP facility so that Crawford (not Complainant) could complete documentation for unescorted access. (Tr. 105, 329). In the hall outside the office were Keene, Crawford, Johnson, Eva Crenshaw, EBASCO Access Screening

Coordinator, and Davis. (Tr. 301).

25. While there, after Davis had returned to his office, Ms.Crenshaw accused Complainant of smelling of alcohol. Keene acknowledged that he had had one or two beers with barbecue at lunch. Ms. Crenshaw then directed Keene to return to his vehicle and wait for Crawford. Ms. Crenshaw went to Casey Davis about Keene and told him that Keene "reeked of alcohol" and was waiting for Crawford outside in Keene's vehicle. Davis admitted that he himself "did not smell alcohol at the time." (Tr. 303). Johnson also testified that he did not smell any alcohol on his breath or notice anything strange about his behavior. (CX 31, p. 34-35).

26. Davis then talked with Cindy McClary, HL&P Supervisor for Fitness for Duty ("FFD") testing, regarding the propriety of testing visiting non-employees. (Tr. 306, 380-81). Davis testified that Ms. McClary told him that she knew of a prior instance where a delivery driver who came to the job site and

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smelled of alcohol was tested. (Tr. 307-08).

27. Ms. McClary testified that she reviewed HL&P's FFD Station Procedure (RX 1), which states that "Any covered individual, visitors or short-term consultants, may receive for-cause drug and alcohol screening following an investigation by the Access Program Director determining that such individual is exhibiting behavior suggesting a lack of 'fitness for duty' or after receipt of credible information that an individual is abusing or under the influence of drugs or alcohol." However, Section 3.14 of the Procedure defines "visitor" as, any individual granted access under a visitor's badge who is not a covered individual, but is subject to for-cause testing. In his instance, Complainant was not seeking a visitor's badge, and obviously did not fall within the Procedure's definition of "visitor."

28. Davis next requested Ray Hardwick, EBASCO Craft Superintendent, to accompany him to the parking area where Keene was standing outside his vehicle. Both Davis and Harwick approached Keene, and requested that he submit to a breathalyzer.

(Tr. 310-11). Keene complied. (CX 8). Although the tests were conducted at HL&P's facility by HL&P personnel, the tests were ordered by Davis, an EBASCO employee. (CX 7, *see also* Tr. 386-87, testimony of Jay Watt Hinson, HL&P Manager, Access Authorization.)

29. The breathalizer test results showed that Keene's amount of alcohol was below the minimum level considered to be a violation of STP procedures. (CX 12, p. K1173).

30. Keene was also requested to give a urine sample for a drug test. Keene indicated that he was unable to provide a sample, as he had already gone to the rest room and did not have to use the rest room at the time. Keene was permitted to wait until he was able to provide the specimen. According to a later investigation conducted by Andrew Woods, "Hinson stated that he informed Keene

that if he chose not to continue to participate in the screening, by procedure, it would be considered a refusal. Hinson indicated that he stated to Keene that a refusal could result in the denial of access to STP and to other nuclear facilities." (CX 12, p. K1173).

31. On June 2, 1994, Keene's attorney wrote a letter to Franke Teague, EBASCO Personnel Director at STP, and William Cottle, HL&P Vice President of Operations, detailing Keene's allegations of falsification of documents and of the alleged harassment he had been subjected to during the visitor testing incident in May. The letter stated that Keene asserted that the

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drug and alcohol testing was done in retaliation for his complaining about the falsification of documents, in violation of the Energy Reorganization Act, and stated that "further harassment or intimidation of Mr. Keene will not be viewed favorably." (CX
11).

32. The NRC subsequently announced an investigation into the issue of the alcohol and drug test of Keene, as well as the falsification of records. (See CX 23).

33. Keene reported to work at STP on June 2, 1994, and was assigned to Mr. Renfro's crew. (Renfro had by this time become a foreman.) Keene was given nothing to do and was placed in a room with other craft workers, including electricians, who were subsequently all called away for classes and/or work. Keene was eventually left alone in the room with nothing to do. (Tr. 121-122). This continued until June 8. (Tr. 122). No one gave Complainant any reason why he was given nothing to do. (Tr. 122-23, 127). Keene had never experienced such treatment before, nor had he seen anyone else subjected to such treatment. (Tr. 133). During the time that he was left "looking around a blank room," (Tr. 133), Keene began keeping a diary to pass the time. (CX 26, Tr. 133).

34. On June 8, 1994, Keene was assigned to work as a laborer for the carpenters, picking up heavy boards, scaffold board, braces, "a grunt for the carpenters." (Tr. 121). He was never given any electrical work. Complainant, however, was not the only electrician building the scaffolding. (Tr. 183).

35. On June 9, 1994, Respondent EBASCO received notice from HL&P that Complainant failed his fitness for duty testing which he underwent on June 2nd, and that HL&P had denied his access to the facility. Respondent EBASCO had no alternative but to terminate the Complainant at this time. (RX 7, 8, 9). Complainant does not seek a determination about whether his removal for cause on June 9, 1994 was retaliatory.

36. Complainant was hired again by Respondent EBASCO to work at the DuPont facility on June 21, 1994 (Tr. 196). Casey Davis reviewed the individuals who were hired at the DuPont facility and was aware that Complainant was going to work there. (Tr. 325).

Conclusion of Law

In a case such as this the burden is on the Complainant to prove by a preponderance of the evidence that retaliation for

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[PAGE 11]
protected behavior was a motivating factor in his termination. The requirements for establishing a prima facia case are that (1) the Complainant engaged in protected activity; (2) the Respondent was aware of such conduct; and (3) the Respondent took some action adverse to the Complainant which was more likely than not the result of the protected activity. See *Dean Dartey v. Zack Co.*, 82-ERA-2 (1983). Once Complainant establishes a prima facia case, then Respondent has the burden of producing evidence that the adverse action was motivated by legitimate, non-discriminatory reasons. If Employer is successful, Complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but a pretext for retaliation.

In this instance, there is no evidence that Complainant made any more than internal complaints prior to his March, 1994, termination. Riley, who was his friend, was not Complainant's union steward. While Riley acted as a messenger to Johnson, before Complainant's name was revealed he had been terminated. Nevertheless, I find internal complaints are protected under the Act. *See Pillow v. Bechtel Construction, Inc.*, 87 ERA-35 (D&O of Remand), July 19, 1993, slip op. 11 (protected activities included making internal complaints to management and contacting union representative). Although the Fifth Circuit in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), held that internal complaints are not protected activity under the Energy Reorganization Act of 1974, 42 U.S.C. §5851(a)(3), the *Brown & Root* case was legislatively overturned, effective October 24, 1992. 42 U.S.C. §5851(a)(1)(A). "For any case filed after that date, even in the Fifth Circuit, internal complaints are protected under the ERA." *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995), slip op. 6-7. Keene filed his complaint under the Act on September 9, 1994.

The next issue is whether or not Complainant's concerns were about safety violations under the Act. As pointed out by EBASCO, Complainant's concerns were (1) that he was requested to sign off for work he did not perform, (2) that he observed Douglas sign off on a work package from his desk and (3) Complainant was requested to place tape over certain cables. Consequently, EBASCO maintains that all these concerns were non-safety violations that do not trigger whistle blower protection under the Act. Complainant, on the other hand, argues, and I agree, that even if a Complainant's concerns are ultimately unfounded, a good faith and reasonable belief that there is a problem is all that is required to amount to protected behavior under the Act.

[PAGE 12]

Regarding refusals to perform certain work, the Secretary held in *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-1, Sec. Dec. and Ord., January 13, 1984, slip op at 7:

> A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. whether the belief is reasonable depends on the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience.

Here, Complainant perceived it to be an act of falsification to sign off on work he had not performed and he also testified he believed it unsafe to conceal possible defects in wiring by the use of tape. In fact he thought these were the project wide policies. Obviously, his concerns about falsification of documents were significant for a "Station Problem Report" was issued. (CX 17). Likewise, the situation became the subject of the "Report of the South Texas Project Allegations Review Team." (CX 23, p. 4-70 and 4-71). Had this all been as inconsequential as EBASCO suggests, one can only wonder about so much follow up and Douglas' ultimate resignation. Consequently, I find the initial concerns of the Complainant under the circumstances were reasonable safety and quality concerns and his expressions of these concerns to Renfro and Douglas constituted protected activity under the Act.

Was EBASCO aware of Complainant's protected activity and did EBASCO take adverse action against Complainant as a result of his activity? Yes. Keene refused to sign off on Renfro's work and both approached Douglas. Complainant asked his friend, Riley, to alert management, and though Complainant's identity was not immediately revealed, an investigation ensued. Sciba told Douglas that the time run meter work packages had been pulled because of Keene's allegations. (Tr. 257-258). Within seven days (March 17 -24) after having first voiced his concerns, Complainant was laid off in a reduction of force per instructions from Sciba and despite the fact that, according to Renfro, there was a shortage of certified electricians. (Tr. 41).

While I understand that employees such as Complainant are subject to layoffs, I am persuaded that in this instance EBASCO's inclusion of Complainant's name in the March 24, 1994, reduction in force was a pretext for retaliation. Complainant had raised concerns that ultimately caused Douglas to resign and sparked investigations. Although he had no guarantee as to how long his employment with EBASCO would last, I find that Complainant's March 24, 1994, termination was adverse action taken against him as a

[PAGE 13]

result of his protected activity. [6]

Regarding the subsequent episode on May 24, 1994, when Complainant returned to STP facility with a friend and was required to undergo alcohol testing, certainly the testing exceeded HL&P's procedures. (RX 1). Granted, Complainant consented to the testing, which was performed by HL&P, however, it was at the instigation of Casey who worked for EBASCO. He was about to return to the site as an employee having accepted a recent call back through the union hall, and I can only conclude Casey, on behalf of EBASCO, would like to have discouraged Complainant's return. I find the testing to have been retaliatory in nature, motivated by Complainant's previous protected behavior.

Lastly, as to Complainant's returning to employment in June, 1994, the reasons that he was not hired were due to HL&P policy, not EBASCO's. Complainant seeks no relief for what occurred on that occasion, simply a finding that the terms and conditions of his brief employment at that time were also in retaliation for his previous protected activity. He was paid his wages, other electricians were also assigned laborers tasks and ultimately he was found unacceptable for employment by HL&P. I am unwilling to find retaliation on that occasion.

Damages

As damages for his March, 1994, termination, Complainant seeks six months loss of wages ($23,299.20) less $9,646.16 earned from other sources for a net recovery of $14,809.01, plus compensatory damages in the amount of ,155.97 for rent, utilities and travel. Attorney's fees and expenses are also sought but no amount is specified. (Tr. 15, 16). Complainant specifically does not seek reinstatement. (Tr. 12-15). [7]

29 C.F.R. §24.6 provides the Secretary of Labor with the authority to require affirmative action to abate the violation, to order payment of back wages and where appropriate compensatory damages as well as the expense of litigation including attorney's fees.

There is testimony that when Complainant accepted the call to work with EBASCO in March of 1994, there was an estimate that the job could last for six months. However, Complainant was an "at will" employee, there were no guarantees concerning the length of his employment, and he had experienced brief intervals of employment in the past with this same employer. When Complainant

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realized termination was imminent, he requested that he be processed out that day so that he could obtain employment in Austin, Texas. That job commenced on April 13, 1994, and actually paid 92 cents an hour more than Complainant was earning at EBASCO. (Tr. 195). Thereafter, he worked for other employers. When Complainant got word he could return to STP he voluntarily quit work at his new job approximately a month before he was to report to EBASCO on June 2, 1994. In other words, Complainant could

have worked longer with the other employer. (Tr. 169, 170).

Complainant has a duty to mitigate his damages in situations such as this, and since the length of his job at EBASCO is indeterminable, I find that he is entitled to loss of wages only from March 25, 1994, through April 12, 1994, a period of 13 working days at $16.18 per hour for 8 hour days, less $245.00 received in unemployment during this period. The total amount which I find Complainant due for lost wages is ,682.72.

As far as compensatory damages for rent, travel and utilities, there is evidence Complainant was relieved of his local obligations when he moved to Austin and that any expenses he had to pay in Austin were minimal since he lived with his former stepson. Travel was incidental to Complainant's line of work.

EBASCO offered no explanation for lowering Complainant's rating when terminating him on March 24, 1994, and I find that since Keene had previously been rated "good" on his termination in January, 1994, that his rating in March was most likely retaliatory just as I have found the termination to have been.

Lastly, as to expenses of litigation, the Secretary recently remanded the matter of *West v. Systems Applications International, supra*, to me stating:

> the attorney needs to submit to the ALJ a fee petition detailing the work performed, the time spent on such work, and the hourly rate of those performing the work. Complainant must also submit an itemization of costs. On review of the fee petition and objections, if any raised by Respondent, the ALJ should determine a reasonable fee to be paid by Respondent to Complainant's attorney and appropriate costs. *Tinsley v. 179 South Street Venture*, Case No. 89-CAA-3, Sec. Dec., Aug. 3, 1989, slip op. at 4, and cases cited therein.

No such petition has been filed in this instance. I will forward this recommended Decision and Order to the Secretary, and since Complainant prevailed in part on his complaint, I will afford Complainant's counsel 10 days from the date of this Decision and Order in which to file a petition and itemization of costs. [8] Employer is granted 10 days thereafter to respond. Any supplemental decision and order issued concerning the matter of fees and expenses will be forwarded to the Secretary.

RECOMMENDED ORDER

It is my recommendation that Complainant should prevail on

his complaint as it pertains to his termination on March 24, 1994, and a final order should issue awarding him ,682.72 in damages for 13 days lost wages at an hourly rate of $16.18 for an 8 hour day. Additionally, I recommend that the Respondent be ordered to expunge from Complainant's record the "fair" appraisal given him on his termination in March, 1994. As to the matter of attorney's fees and expense, the same shall hereinafter be addressed in a Supplemental Decision and Order.

SO ORDERED this 29 day of September, 1995, at Metairie, Louisiana.

_____
C. RICHARD AVERY
Administrative Law Judge

CRA:kw

[END NOTES]

[1] Raytheon Engineers and Constructors, Inc., purchased EBASCO on or about December 1993 (Tr. at 17). However, for the purposes of this brief, the Respondent shall be referred to as "EBASCO."

[2] On motion of the Complainant, HL&P was voluntarily dismissed without prejudice on June 15, 1995. The dismissal was approved by the Secretary of Labor on August 23, 1995.

[3] The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, conclusions of law and order, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

[4] Respondent asserted that Complainant's internal protected activity was not protected under the Acts, thus depriving the Department of jurisdiction. (Tr. 13).

[5] The demineralization skid project is also referred to as the reverse osmosis project.

[6] As far as Complainant's testimony at his deposition that he did not perceive his March 24, 1994 termination as retaliatory (RX 21, p. 286), I accept his testimony and explanation at the hearing that he was confused as to which date he was being asked about.

[7] Complainant is not seeking money damages for the May alcohol testing episode nor is he seeking wages or reinstatement for the June 9, 1994, termination since he was denied access on that occasion by HL&P because of testing results. (Tr. 12-16, 441-443). What he seeks for those two events is a finding that EBASCO's actions on both occasions were taken in retaliation for his previous protected behavior. For reasons previously stated,

I made such a find only as to the May testing occurrence.

[8] The application will be considered in light of *Hensley v. Eckerhart*, 461 U.S. 425, 103 S.Ct. 1933 (1982) and the Fifth Circuit's holding in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (1993), that a relationship should exist between the fee awarded and the results of the case.